LIBRARY
SUPREME COURT, U. S.

94

No. [redacted]

Office-Supreme Court, U.S.
FILED
MAY 2 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

JOHN J. PYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD J. CALIHAN, JR.
53 West Jackson Blvd.
Chicago, Illinois 60604
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Statement of the Case	6
Questions Presented	8
Reasons for Granting the Writ	10
Conclusion	16

Petitioner's Appendix

A—Opinion	App. 1
B—Order Affirming	App. 16
C—Order Denying Petition for Rehearing	App. 17

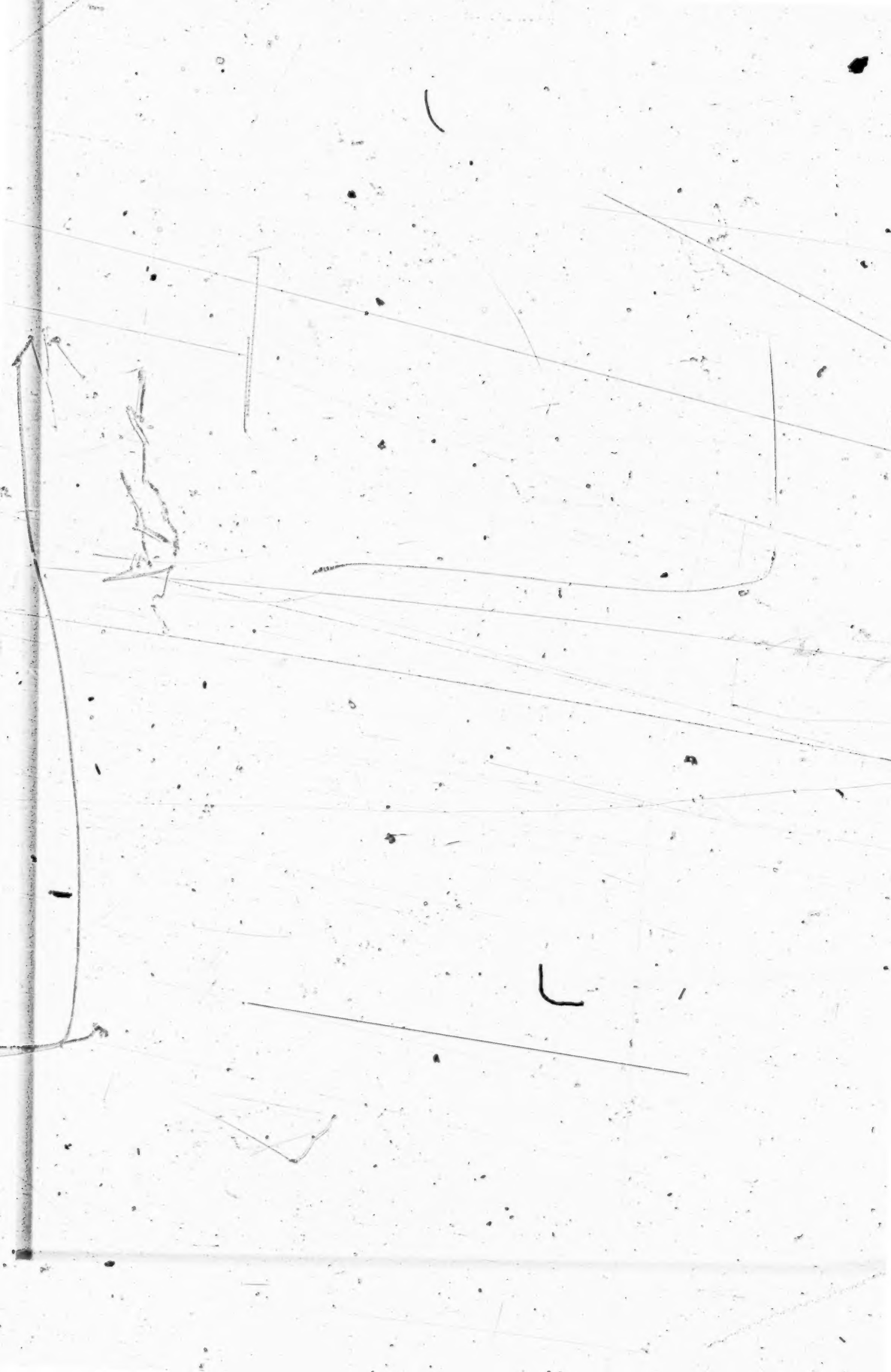
Authorities Cited

Cases

Brown v. United States, 150 U.S. 93	12, 14
Fiswick v. United States, 329 U.S. 211	10, 12, 14
Krulewitch v. United States, 336 U.S. 440	10, 12, 14

Other Authorities

U.S.C., Section 1952, Title 18	10
U.S.C., Section 371, Title 18	12
F.R.C.P., Rule 52(a)	13



In the
Supreme Court of the United States

OCTOBER TERM, 1968

No.

JOHN J. PYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: *The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:*

Your petitioner, John J. Pyne, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction for conspiracy to violate Section 1952, Title 18, United States Code, to wit, travel in interstate commerce for the purpose of carrying on an unlawful business enterprise involving extortion, in violation of Section 371, Title 18, United States Code, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this petition. (App. A, p. App. 1)

JURISDICTION

Judgment of the Court of Appeals was entered on March 7, 1969 (App. B, p. App. 16). A timely petition for rehearing was denied on April 3, 1969. (App. C, p. App. 17). The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

STATUTES INVOLVED

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. * * * "

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit anff offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

THE INDICTMENT

"The AUGUST 1966 GRAND JURY charges:

"1. Beginning on or about April 20, 1966, and continuously thereafter to and including May 25, 1966, the exact date being unknown to the Grand Jury, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, and elsewhere, the defendants,

JOHN M. FELLABAUM,
SHERMAN C. KAMINSKY,
JOHN J. PYNE, and
DOSS THOMAS SMITH,

and the following co-conspirator not named as a defendant herein,

ELWOOD LEE HAMMOCK,

hereinafter referred to as co-conspirator, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree together with each other and with divers other persons whose names are to the Grand Jury unknown, to commit an offense against the United States to-wit, to travel and cause travel in interstate commerce, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, involving extortion; in violation of the Illinois Revised Statutes of 1965, Chapter 38, Section 16-1, to-wit, 'theft;' and said defendants unlawfully, wilfully and knowingly did perform and cause to be performed acts facilitating the carrying on of said unlawful activity; in violation of Title 18, United States Code, Section 1952.

"2. It was a part of said conspiracy that John Fellabaum and Doss Thomas Smith would steal and cause to be stolen wallets, billfolds and the contents thereof, from various victims.

"3. It was a further part of the conspiracy that the co-conspirator Elwood Lee Hammock would travel from North Carolina to Chicago, Illinois, where he met with the defendant Sherman C. Kaminsky. The co-conspirator Elwood Lee Hammock and the defendant Sherman C. Kaminsky then proceeded to drive to Normal City, Illinois, to extort a victim.

"4. In furtherance of said conspiracy and in pursuance of the objects thereof, the defendants and co-conspirator performed the following:

OVERT ACTS

"1) On or about April 20, 1966, John M. Fellabaum, defendant, met Bruce T. Kaiser in Chicago, Illinois;

"2) On or about May 16, 1966, Sherman C. Kaminsky, defendant, from Chicago, Illinois, called co-conspirator Elwood Lee Hammock, in Fayetteville, North Carolina;

"3) On or about May 17, 1966, John J. Pyne, defendant, sent Seventy-five dollars ($75) from Chicago, Illinois, to co-conspirator Elwood Lee Hammock, in Lillington, North Carolina;

"4) On or about May 18, 1966, co-conspirator Elwood Lee Hammock flew from Raleigh-Durham, North Carolina, to Chicago, Illinois;

"5) On or about May 19, 1966, co-conspirator Elwood Lee Hammock, and defendants Sherman C. Kaminsky and John J. Pyne, had a telephone conversation at Chicago, Illinois;

"6) On or about May 21, 1966, Doss Thomas Smith, defendant, had a conversation with co-conspirator Elwood Lee Hammock, at the Holiday Inn, in Chicago, Illinois; all in violation of Title 18, United States Code, Section 371."

STATEMENT OF THE CASE

The petitioner, John J. Pyne, was charged in indictment No. 66 CR 534 returned on August 23, 1966. Said indictment charged John M. Fellabaum, Sherman Kaminsky, John J. Pyne and Doss Thomas Smith with a violation of Title 18, Section 371, United States Code, in that for the period between April 20, 1966 and to and including May 25, 1966, the defendants did conspire to travel and cause travel in interstate commerce with intent to promote activity involving extortion, in violation of Illinois Revised Statutes 1965, Chapter 38, Section 16-1, to wit, "theft"; and performing and causing to be performed acts facilitating the carrying on of said activity.

The defendant Kaminsky entered a plea of guilty and thereafter became and still is a fugitive. The defendant Smith entered a plea of guilty and was sentenced to a term of four years. The defendants Pyne and Fellabaum were tried by a jury before The Honorable Edwin A. Robson and were found guilty. The Court sentenced the defendant Pyne to the custody of the Attorney General for a period of five years and fine him $10,000.00 and costs, said sentence to run consecutively to a sentence of five years imposed by Judge Hubert L. Will in a similar case involving the same type of offense.

On appeal to the United States Court of Appeals for the Seventh Circuit, conviction was affirmed. The evidence in this case taken in the light most favorable to the Government is as follows:

> On April 19, 1966, Bruce Kaiser, who lived in Normal, Illinois, met defendant Fellabaum at a bar in Chicago, and shortly thereafter accompanied Fellabaum to a hotel room where Kaiser and Fellabaum engaged in a homosexual act. Fellabaum then de-

manded and got Kaiser's wallet and money. The following day Fellabaum called Hammock, the unindicted co-conspirator, who was then in New York. Hammock testified that after Fellabaum told him about the Kaiser incident, he told Fellabaum to come to New York. On April 21, Fellabaum arrived in New York, gave Hammock several cards from Kaiser's wallet, and informed Hammock that Kaiser looked like a good prospect for extortion.

Hammock then called Pyne, told him of the Kaiser affair, and advised Pyne to call Kaminsky and ask the latter to contact Hammock in Fayetteville, North Carolina, where Hammock was going. On April 23, Kaminsky called Hammock in Fayetteville and told him to come to Chicago to meet with Pyne. Hammock arrived on April 24 and called Pyne. Kaminsky, Pyne, and Hammock then discussed when they should "make a play" for Kaiser. Hammock called Fellabaum in New York, told him of his discussion with Pyne and Kaminsky, and directed him to come back to Chicago. Fellabaum agreed to do so.

On April 26, Hammock was arrested by agents of the Federal Bureau of Investigation on another charge. He was released in time to go to New York for a court appearance on May 6. On that day, he began full cooperation with the F.B.I. in the matter now before this court. No further action was taken by Hammock in the Kaiser matter without the knowledge and usually the accompaniment of the F.B.I.

Subsequent to May 6, Hammock met Kaminsky in Philadelphia and discussed doing something about Kaiser. Pursuant to this conversation, Hammock called Doss Smith on Kaminsky's instructions and told him

to mail the wallet to Fayetteville; in the meantime, Smith had obtained the wallet from Fellabaum. Kaminsky then called Hammock and instructed him to come to Chicago. Hammock and two F.B.I. agents then left for Chicago, and Hammock picked up the wallet at the post office box to which he had previously mailed it. Kaminsky told Hammock he would be ready to move the following morning on the "Normal" matter (*i.e.*, the Kaiser extortion).

The next morning, Hammock and Kaminsky drove to Pyne's house, and Kaminsky took a police badge (referred to as a "button") from Pyne's car to use in the extortion. After beginning the drive to Normal, the men concluded they would arrive at Normal too late in the day to accomplish their purposes, and Kaminsky therefore decided it would be better to wait a few days. Some discussion was then had as to whether they should continue "the Kaiser play". Apparently, however, no further effort was made to contact Kaiser prior to the time they were arrested.

QUESTIONS PRESENTED

1. Where a conspiracy contemplates local extortion and thereafter one of the co-conspirators commences cooperation with the Federal Bureau of Investigation, can his subsequent act of travel from North Carolina to Chicago, Illinois, while he was acting as an undercover Government agent, be used against his co-conspirators and indeed form the very basis upon which the Court for the Northern District of Illinois had jurisdiction under the interstate commerce clause?

2. Can a special employee acting under the aegis of the Federal Bureau of Investigation possess the *animus* necessary to a criminal breach of the interstate commerce laws so as to give Courts of the United States the element necessary to their jurisdiction over his alleged co-conspirators.

3. Where the central alleged aim of the conspiracy never existed: to wit, the travel of Hammock from North Carolina to Chicago, Illinois, until after the co-conspirator Hammock commenced active cooperation with the agents of the Federal Bureau of Investigation and became their agent and where the indictment charged that the said particular travel was the object of the conspiracy, can said act of travel from North Carolina to Chicago, Illinois by one no longer a co-conspirator be an act in furtherance of the conspiracy and the object of the conspiracy?

4. Can a person acting as an agent of the United States be a party to an agreement to commit an offense against the laws of the United States?

5. Where, contrary to cases decided by this Court, the trial court admitted a post-conspiracy statement made by a co-defendant against the petitioner Pyne on motion by the prosecutor "that the Government had shown a prima facie case of conspiracy" and which motion was granted by the trial court and where both the motion and the granting of the motion were made in the presence of the jury, did not the Court of Appeals err in holding that while it was error, it was harmless error?

REASONS FOR GRANTING THE WRIT

1. The Court should grant certiorari in order to decide whether or not a Government agent or informer acting at the direction of the Federal Bureau of Investigation can conspire to commit a crime against the Government of the United States.

2. This Court should grant certiorari to determine whether an agreement to aid and abet a government agent in the performance of his duties can be a conspiracy to commit an offense against the United States.

3. The decision of the United States Court of Appeals for the Seventh Circuit holding as harmless error the admission of a post-conspiratorial statement made by one of the defendants against the petitioner, under circumstances where the trial judge, by admitting said statement held, in the presence of the jury, that the government had proven a prima facie case of conspiracy, not only impinges upon a fact determination to be made by the jury, but is contrary to decisions of this Court in *Krulewitch* v. *United States,* 336 U.S. 440, and *Fiswick* v. *United States,* 329 U.S. 211. Petitioner did not receive a fair trial.

I.

An important question in conspiracy law is involved in this case. The one count indictment charged a conspiracy to violation Section 1952, Title 18, United States Code. The object of the conspiracy which vested jurisdiction in the United States District Court for the Northern District of Illinois, was that the petitioner and others conspired with Elwood Lee Hammock to travel from North Carolina to Chicago, Illinois.

Originally the conspirators had met in Chicago, Illinois, and had agreed to go down to Normal, Illinois, and

attempt extortion against a person by the name of Kaiser. The defendant Fellabaum had taken Kaiser's wallet in Chicago, Illinois and had given it to Hammock in New York City. (This is not the interstate commerce charged). Hammock came to Chicago from New York and met the petitioner Pyne and one Kaminsky near the O'Hare Airport in Chicago. On April 24, 1966 they agreed to go to Normal, Illinois, several days later but on April 26, 1966 Hammock was arrested and was not released until five or six days later. Hammock had a court call in New York City, and he traveled there, appeared, and the following day went to his home in Fayetteville, North Carolina. At that point on May 6th, 1966 he commenced active co-operation with agents of the Federal Bureau of Investigation. They told him to do whatever the other defendants asked him to do.

Several weeks later, he received a call from Kaminsky to come to Chicago in order to attempt the extortion in Normal, Illinois. Hammock agreed to come to Chicago. Agents of the F.B.I. accompanied him, paid for his travel, and paid for his hotel bills while he was in Chicago. The F.B.I. agents occupied a room adjoining Hammock's.

The defense of this case was that the travel by Hammock from North Carolina to Chicago, Illinois, on May 18, 1966, was made at a time when he was no longer a conspirator. He commenced co-operation with agents of the Federal Bureau of Investigation on May 6, 1966. *His agreement* to come to Chicago was made at a time when he was no longer a conspirator. In other words, the defense contended below that he could not have been a co-conspirator; he had become an agent of the Government almost two weeks prior to the act of travel which was the object of the conspiracy, was even *considered and undertaken* by the conspirators.

Hammock's agreement to travel had to be the "gravamen" of the offense. It was a one count indictment charging a conspiracy to commit the crime of travel in interstate commerce with intent to carry out an unlawful activity, to-wit: extortion.

If the defendants in this cause had agreed within the State of Illinois to extort a sum of money from an Illinois victim, there would be no federal offense under Section 371, Title 18, United States Code. This was the posture of the case at the time the conspirators were in Chicago, Illinois. What they contemplated at the meeting near the O'Hare Airport in Chicago, Illinois, was a local offense. It was almost two weeks after Hammock had commenced co-operation with agents of the F.B.I. that the further agreement to have him travel from North Carolina to Chicago, Illinois, was considered.

This Court has held in *Krulewitch* v. *United States,* 336 U.S. 440, *Fiswick* v. *United States,* 329 U.S. 211, and *Brown* v. *United States,* 150 U.S. 93 that acts done after a conspiracy has ended, or acts done by one not a co-conspirator at the time, may not be attributed to the alleged co-conspirators. The reviewing court held: (App. A p. 4).

> "If Pyne and Fellabaum had been charged with the offense of interstate travel as a substantive crime under Title 18, §1952, this question raised by the appellants would be relevant. However, the appellants err in contending that Hammock's travel was the 'gravamen' of this indictment; defendants were charged with *conspiring* to violate §1952, and interstate travel itself is not an essential element for such conspiracy."

This Court should grant certiorari in order to decide an important question of conspiracy law i.e., the extent, if any, to which a government agent can participate in a conspiracy and to which he may by his acts bind other conspirators.

II.

A conspiracy, by definition, is an agreement to commit an offense against the United States. In this instance the act to be committed was the transportation of Hammock in interstate commerce for purposes of extortion. But, as an agent of the United States, Hammock could not do that act with the intent necessary to a violation of 1952. It is clear that whatever agreement there was, it contemplated Hammock's travel in interstate commerce. But, as an agent of the United States, his travel in interstate commerce could not be an offense against the United States. Therefore, whether the other alleged co-conspirators knew it or not, their agreement was not to commit an offense against the United States. Just as there can be no guilty aider and abettor without a guilty principal, so also there can be no crime without a criminal. There can be no offense without an offender.

III.

The Court of Appeals for the Seventh Circuit found there was no error in a ruling by the trial court which permitted the jury to apply against the petitioner Pyne, a post-conspiracy statement made by Fellabaum to F.B.I. Agent Tolan concerning Fellabaum's activities in securing the victim's wallet. The Court of Appeals conceded that it was error but finds that it was harmless and did not effect the petitioner's rights under Rule 52(*a*) of the Federal Rules of Criminal Procedure. When the prosecutor moved that certain evidence which was held only against certain of the defendants now be considered

against each, the prosecutor stated, as grounds for admission, in the presence of the jury "that the Government has shown a prima facie case of conspiracy." The trial court ultimately sustained the motion and permitted the evidence to be offered, even though the post-conspiratorial admission never could have been admitted under any theory so far as this petitioner knows. The Court of Appeals, in its opinion, stated:

> "Although the court supported the government's position with regard to the application of the evidence, it does not follow that the jury would read into such a ruling a judicial approbation of the government's contention that a prima facie case had been proved."

What other conclusion could the jury have come to? The ruling clearly told the jury that the prior admission of Fellabaum to F.B.I. Agent Tolan after the conspiracy was concluded, and which originally the Court ruled not to be admitted against petitioner Pyne, was now being admitted. The petitioner contended below that it did much more than that. This ruling tells the jury that the Court agrees with the prosecutor that a prima facie case of conspiracy had been made. It was a positive statement to the jury that Fellabaum's admissions could be used against the petitioner Pyne. This was a clear invasion of the petitioner's right to have the question of fact, to-wit: the existence of a conspiracy and petitioner's participation therein, decided by a jury. This is why he asked for a jury trial. The Trial Court's ruling could not be erased by his later instruction. The instruction did not cure this and it could not be harmless error. If it is harmless error then this Court's ruling in *Fiswick* v. *United States*, 329 U.S. 211, *Krulewitch* v. *United States*, 336 U.S. 440 and *Brown* v. *United States*, 150 U.S. 93, and other authorities too numerous to mention must go down the drain.

The Court of Appeals for the Seventh Circuit also held that an additional reason for holding this error harmless was that there was substantial independent evidence of the entire operation of the conspiracy and the guilt of the petitioner and his associates. At this portion of its opinion, at page 10, the Court of Appeals relied again on Hammock's conversations with persons other than the petitioner Pyne. This again points up the contradiction in the Court's holding. If Hammock was not in fact a conspirator because of his cooperation, how then could his conversations with other defendants be held against the petitioner Pyne. Yet the Court of Appeals correctly stated the rule at page 4 of its opinion when referring to this matter. That Court stated:

> "These cases state the rule that acts done after a conspiracy is ended, or acts done by one not a co-conspirator at the time, may not be attributed to the alleged co-conspirators. See especially the Morello case at 635." (App. A, p. 4)

The Court of Appeals thus conceded the rule asserted by the petitioner to be correct. But how could the petitioner Pyne agree with Hammock who was an agent of the Government? Stated otherwise, could the petitioner have agreed with an agent of the F.B.I. to commit a crime? Obviously, the petitioner could not, not unless the agent of the F.B.I. were actually committing a crime. If the agent were acting in his official capacity, the petitioner could not agree with him to commit an offense. It was contended in the Court of Appeals that Hammock was an agent of the United States. He could not have been a conspirator, hence his conversations with persons other than the petitioner, after Hammock had ceased being a conspirator were not admissible against the petitioner.

Hence, the corroboration, which the Court of Appeals held was ample to override any error committed by the admission of Fellabaum's testimony against the petitioner Pyne, must fail.

This Court should exercise its jurisdiction in this cause in order to correct an erroneous application of this Court's decision in *Krulewitch, Fiswick* and *Brown* to the facts of this case.

CONCLUSION

Wherefore, for the above and foregoing reasons, the Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

EDWARD J. CALIHAN, JR.,
Attorney for Petitioner

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 JANUARY SESSION, 1969

Nos. 16780, 16781
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN M. FELLABAUM and JOHN J. PYNE,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 7, 1969

Before SWYGERT and CUMMINGS, *Circuit Judges*, and GORDON, *District Judge*.[1]

GORDON, *District Judge*. These are appeals by John Pyne and John Fellabaum from judgments of conviction entered after jury verdicts of guilty against each of them. They were found guilty of a conspiracy under 18 U.S.C. §371 to "travel and cause travel in interstate commerce, with intent to promote, manage, establish, carry and facilitate the promotion, management, establishment and carrying on of an unlawful activity involving

[1] The writer of this opinion is sitting by designation from the United States District Court for the Eastern District of Wisconsin.

extortion . . . in violation of Title 18, United States Code, Section 1952." The indictment alleged six overt acts performed in furtherance of the conspiracy.

Indicted along with Pyne and Fellabaum were Sherman Kaminsky and Doss Smith. Kaminsky entered a guilty plea and thereafter became a fugitive; he still was a fugitive at the time of this appeal. Smith pleaded guilty and was sentenced to a prison term of four years. Another conspirator, Elwood Hammock, was not indicted. The facts are to be viewed in a light most favorable to the government. See *Glasser* v. *United States,* 315 U.S. 60 (1942). A summary follows.

On April 19, 1966, Bruce Kaiser, who lived in Normal, Illinois, met defendant Fellabaum at a bar in Chicago, and shortly thereafter accompanied Fellabaum to a hotel room where Kaiser and Fellabaum engaged in a homosexual act. Fellabaum then demanded and got Kaiser's wallet and money. The following day Fellabaum called Hammock, the unindicted co-conspirator, who was then in New York. Hammock testified that after Fellabaum told him about the Kaiser incident, he told Fellabaum to come to New York. On April 21, Fellabaum arrived in New York, gave Hammock several cards from Kaiser's wallet, and informed Hammock that Kaiser looked like a good prospect for extortion.

Hammock then called Pyne, told him of the Kaiser affair, and advised Pyne to call Kaminsky and ask the latter to contact Hammock in Fayetteville, North Carolina, where Hammock was going. On April 23, Kaminsky called Hammock in Fayetteville and told him to come to Chicago to meet with Pyne. Hammock arrived on April 24 and called Pyne. Kaminsky, Pyne, and Hammock then discussed when they should "make a play" for Kaiser.

Hammock called Fellabaum in New York, told him of his discussion with Pyne and Kaminsky, and directed him to come back to Chicago. Fellabaum agreed to do so.

On April 26, Hammock was arrested by agents of the Federal Bureau of Investigation on another charge. He was released in time to go to New York for a court appearance on May 6. On that day, he began full cooperation with the F.B.I. in the matter now before this court. No further action was taken by Hammock in the Kaiser matter without the knowledge and usually the accompaniment of the F.B.I.

Subsequent to May 6, Hammock met Kaminsky in Philadelphia and discussed doing something about Kaiser. Pursuant to this conversation, Hammock called Doss Smith on Kaminsky's instructions and told him to mail the wallet to Fayetteville; in the meantime, Smith had obtained the wallet from Fellabaum. Kaminsky then called Hammock and instructed him to come to Chicago. Hammock and two F.B.I. agents then left for Chicago, and Hammock picked up the wallet at the post office box to which he had previously mailed it. Kaminsky told Hammock he would be ready to move the following morning on the "Normal" matter (*i.e.*, the Kaiser extortion).

The next morning, Hammock and Kaminsky drove to Pyne's house, and Kaminsky took a police badge (referred to as a "button") from Pyne's car to use in the extortion. After beginning the drive to Normal, the men concluded they would arrive at Normal too late in the day to accomplish their purposes, and Kaminsky therefore decided it would be better to wait a few days. Some discussion was then had as to whether they should continue "the Kaiser play". Apparently, however, no further effort was made to contact Kaiser prior to the time they were arrested.

This appeal presents a number of asserted errors in the trial court. They will be taken up individually.

I. TRAVEL IN INTERSTATE COMMERCE

The first allegation of error is that the government failed to prove travel in interstate commerce, which the defendants contend is an essential element of the crime charged in the indictment. The defendants' argument runs as follows: The indictment charged a conspiracy to violate 18 U.S.C. §1952, to-wit: "to travel and cause travel in interstate commerce, with an intent to promote . . . an unlawful activity, involving extortion. . . ."; the only overt act alleged in the indictment having to do with travel in interstate commerce was the trip on May 18, 1966 from North Carolina to Chicago by the co-conspirator, Hammock; since at that time Hammock had already begun cooperating with the F.B.I., this trip could not be in furtherance of the conspiracy; therefore proof of interstate travel by a co-conspirator, the "gravamen of the charge", is missing.

The following cases are cited to support the defendants' contention: *Krulewitch* v. *United States,* 336 U.S. 440 (1949); *Fiswick* v. *United States,* 329 U.S. 211 (1956); *Brown* v. *United States,* 150 U.S. 93 (1893); and *United States* v. *Morello,* 250 F.2d 631 (2d Cir. 1957). These cases state the rule that acts done after a conspiracy has ended, or acts done by one not a co-conspirator at the time, may not be attributed to the alleged co-conspirators. See especially the *Morello* case at 635.

If Pyne and Fellabaum had been charged with the offense of interstate travel as a substantive crime under Title 18, §1952, this question raised by the appellants would be relevant. However, the appellants err in contending that Hammock's travel was the "gravamen" of

this indictment; defendants were charged with *conspiring* to violate §1952, and interstate travel itself is not an essential element for such conspiracy.

A conspiracy to commit a crime is a different offense from the substantive crime which is the objective of the conspiracy. *United States* v. *Rabinowich,* 238 U.S. 78 (1915). The gist of the offense of conspiracy under §371 of Title 18 is the *agreement* to violate the substantive statute, which in this case is §1952. *United States* v. *Borelli,* 336 F.2d 376 (2d Cir. 1964), cert. den. 379 U.S. 960 (1965).

The government was obliged to prove that there was an agreement to commit the crime of interstate travel in aid of racketeering and to show at least one overt act toward that end; it was not necessary for the government to prove the accomplishment of the objective of the conspiracy. *Pinkerton* v. *United States,* 328 U.S. 640 (1946); *Downing* v. *United States,* 348 F.2d 594 (5th Cir. 1965), cert. den. 382 U.S. 901 (1965); *Lewis* v. *United States,* 11 F.2d 745 (6th Cir. 1926). It is also not necessary that the prosecutor prove each of the overt acts alleged in the indictment. See *United States* v. *Vittoria,* 284 F.2d 451 (7th Cir. 1960).

The testimony in this case was sufficiently clear to enable the jury to find an intention on the part of the conspirators to travel or cause travel in interstate commerce in furtherance of the agreement. If the jury believed Hammock's testimony that Kaminsky called him in North Carolina on May 16 and told him to come to Chicago, this was sufficient to support a finding of an intent to travel and cause travel in interstate commerce. The fact that this intention failed because of Hammock's

cooperation with the F.B.I. is immaterial in a conspiracy prosecution. See *Singer* v. *United States,* 208 F.2d 477 (6th Cir. 1953).

II. PROOF OF FELLABAUM'S INTENT AND KNOWLEDGE

The defendant Fellabaum also asserts that the government failed to prove that he had the requisite knowledge or intent to conspire to commit the crime charged in the indictment. Fellabaum urges that *Ingram* v. *United States,* 360 U.S. 672 (1959) is precisely in point. In *Ingram,* the Supreme Court stated at pages 677-78 that

> "It is fundamental that a conviction for conspiracy under 18 U.S.C. §371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' *Pereira* v. *United States,* 347 U.S. 1, 12. . . ."

Evidence of a defendant's knowledge of the purpose of the conspiracy must be clear and unequivocal. It may, however, be inferred from the circumstances, acts, and conduct of the parties. *Jacobs* v. *United States,* 395 F.2d 469 (8th Cir. 1968).

On the other hand, in order to support a conspiracy conviction, it is not necessary that the defendant have knowledge of each and every detail of the plan; it is enough that he knew its essential nature. *Blumenthal* v. *United States,* 332 U.S. 539 (1947); *Nassif* v. *United States,* 370 F.2d 147 (8th Cir. 1966); *United States* v. *Vittoria,* 284 F.2d 451 (7th Cir. 1960).

The facts in this case show that after obtaining Kaiser's wallet, Fellabaum called Hammock in New York to tell him about the incident; the next day Fellabaum went to New York, where he told Hammock that "the man looked real good because he took the turn real nice and

he looked like a little Herman." (Tr. 91) (Hammock defined "taking the turn" as no resistance to the demand for the wallet; a "little Herman" is a man who is "real frightened".)

A few days later in Chicago, Hammock, in the presence of Pyne, called Fellabaum in New York. Hammock told him

> "that I was in Chicago now and that I was talking with Pyne and Kaminsky, that they wanted him out of New York immediately and that we were deciding on whether we should go on the Normal man [Kaiser] tomorrow or whether we should go Wednesday, but at any rate, he had to get out of New York and get back to Chicago and we would discuss what would happen from there." (Tr. 118-19)

In response to this, Hammock testified that Fellabaum stated "he would make arrangements to come the next day". (Tr. 119)

There is ample evidence to show that Fellabaum knew that to commit the extortion he, or others, would have to travel in interstate commerce. See *Jacobs* v. *United States*, 395 F.2d 469 (8th Cir. 1968). Compare *Nassif* v. *United States*, 370 F.2d 147 (8th Cir. 1966). Upon the evidence before it, the jury was entitled to find that Fellabaum had, beyond a reasonable doubt, both the knowledge and intent necessary to commit the crime charged in the indictment.

III. FELLABAUM'S ADMISSIONS IN THE ABSENCE OF COUNSEL

Fellabaum also urges that the trial court erred in admitting damaging statements made by him on three separate occasions to agent Tolan of the F.B.I. The heart of the objection is that Fellabaum's known counsel was not notified of any of the three sessions.

The trial court admitted the testimony after a hearing on the motion to suppress. In the course of the hearing, Total testified that on each occasion Fellabaum was given proper warnings and advised of his rights, consistent with *Miranda* v. *Arizona*, 384 U.S. 536 (1966). He further testified that Fellabaum had requested on each occasion that his counsel, a Mr. Sonenshine, not be present; he "did not want Mr. Sonenshine advised of the fact that he was being interviewed by the F.B.I." (Tr. 46-47, 59, 63). At each questioning Fellabaum signed written waivers of his right to counsel.

At the time of his statements to Tolan, Fellabaum was in New York awaiting sentencing after a guilty plea in another matter; Mr. Sonenshine represented Fellabaum in such case. In addition, Attorney Sonenshine also represented Sherman Kaminsky, a co-conspirator in the instant action.

No claim is made that agent Tolan actually pressured or coerced Fellabaum into making the statements. The issue comes down to this: May a defendant, who has an identified counsel, be questioned when, after adequate constitutional warnings, he has fully, repeatedly, and affirmatively declined the presence of counsel? We conclude, under the circumstances appearing in this case, that such questioning is fully consistent with all constitutional safeguards. As stated in *Miranda* at page 475:

> "an express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver."

This court stated in *United States* v. *Smith*, 379 F.2d 628, 633 (7th Cir. 1967), cert. den. 389 U.S. 993 (1967) that

> "We are of the opinion that in post-*Miranda* cases the *Miranda* rule applies with *greater* force to preclude as unconstitutional the admission of statements resulting from in-custody interrogation *after known retainer or appointment of counsel* and without counsel's presence or approval, unless it very clearly appears that the accused deliberately and understandingly chose to forego the assistance of counsel at such interrogation."

The burden of showing a waiver in this type of case rests heavily on the government, but we think that the factual situation in the case at bar is precisely what was referred to in the *Smith* case. Three separate times Fellabaum deliberately and affirmatively asserted that he did not want to have his counsel present after receiving full warnings as to his rights. No evidence to the contrary appears in the record. See *United States* v. *Nielsen,* 392 F.2d 849 (7th Cir. 1968).

The motion to suppress agent Tolan's testimony was properly denied.

IV. THE POST-CONSPIRACY STATEMENT

Pyne also assigns as error a ruling of the trial court which permitted the jury to apply against Pyne a post-conspiracy statement made by Fellabaum to agent Tolan.

Tolan testified that on June 20, 1966, Fellabaum told him about the meeting with Kaiser and the events that ensued in the hotel room. This admission to Tolan took place after the conspiracy, by the terms of the indictment, had ended. It was not, therefore, admissible against Pyne, a co-conspirator. *Krulewitch* v. *United States,* 336 U.S. 440 (1949); *Fiswick* v. *United States,* 329 U.S. 211 (1946). Fellabaum's statement to Tolan did not directly inculpate Pyne; and therefore the error did not reach constitutional proportions under *Bruton* v. *United States,* 391 U.S. 123

(1968); Cf. *United States* v. *Lyon*, 397 F.2d 505 (7th Cir. 1968); *United States* v. *Guajardo-Melendez*, 401 F.2d 35 (7th Cir. 1968).

Upon objection, the trial judge originally ruled that Fellabaum's admission was not to be applied to Pyne, and he instructed the jury that "the record may show that this testimony at this time pertains only to the defendant Fellabaum". (Tr. 77) Again, a few moments later, the judge stated "at this time it applies only to the defendant Fellabaum". Tr. 78) See *Lutwak* v. *United States*, 344 U.S. 604 (1953).

Two days later, the government moved to have the testimony of another witness admitted against both Pyne and Fellabaum on the ground that a prima facie case of conspiracy had been proved. After hearing argument in that matter, the court ruled that

> "All of the evidence that has been introduced, that the court indicated would apply just to either the defendant Fellabaum or to the defendant Pyne, or that would be considered in connection with the case, is now considered as against both the defendants here on trial and may be so considered by the jury." (Tr. 396-97)

It was in this manner, the defendant Pyne argues, that the testimony of two days earlier became applicable against Pyne, and it is to this ruling that the objection is now made. When the court made the ruling just quoted above, no reference was made in the presence of the jury to the earlier statement (by Fellabaum to Tolan); however, since that ruling was broad enough to include the statement of Fellabaum to Tolan, the ruling must be deemed to be error under *Krulewitch* and *Fiswick*, both cited above. However, for the reasons which follow, we

find that the error was harmless and did not affect Pyne's substantial rights under rule 52(a), Federal Rules of Criminal Procedure, *Kotteakos* v. *United States,* 328 U.S. 750 (1946); *United States* v. *D'Antonio,* 326 F.2d 151 (7th Cir. 1966), cert. den. 385 U.S. 900 (1966).

As just stated, the trial judge's challenged ruling made no specific mention of the Fellabaum declaration; it was therefore not directly called to the attention of the jury. Also, the judge instructed the jury that:

> ". . . in determining whether a particular defendant was a member of the conspiracy, if any, you should consider only his acts and statements. He cannot be bound by the acts or declarations of the other participants. . . . ." (Tr. 708)

and that

> ". . . statements of any conspirator which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person making them." (Tr. 710)

See *Calhoun* v. *United States,* 368 F.2d 59 (9th Cir. 1966).

An additional reason for holding the error harmless is that there was substantial independent evidence of the entire operation of the conspiracy and of the guilt of Pyne and his associates. See *Calhoun,* supra. Hammock testified concerning his conversations and dealings with Fellabaum about the victim, Kaiser; Hammock also related his conversations with Pyne concerning the matter of extorting Kaiser. Hammock further testified that when he came to Chicago to meet with Pyne, at Kaminsky's instruction, they discussed "making a play" for Kaiser. Fellabaum's admission to Tolan was strong evidence of the homosexual event, but direct evidence is not needed

to find a conspiracy; circumstantial evidence suffices. *Miller* v. *United States,* 382 F.2d 583 (9th Cir. 1967), cert. den. 390 U.S. 984, reh. den. 391 U.S. 971 (1968).

Defendant Pyne contends that another error occurred during the trial when, in the presence of the jury, the prosecutor contended that certain evidence should be received on the ground "that the government has shown a prima facie case of conspiracy".

Pyne's attorney promptly moved for a mistrial, which the court denied, and then the jury was excused in order that the court could consider the receipt of the evidence in question. Thereupon, the court recalled the jury and ruled that the evidence introduced could be employed against both the defendants. No reference was made by the court to the government's claim that a prima facie case of conspiracy had been proved. Although the court supported the government's position with regard to the application of the evidence, it does not follow that the jury would read into such ruling a judicial approbation of the government's contention that a prima facie case had been proved. We find no error in this regard.

V. JURY INSTRUCTIONS

The appellants bring to our attention several claimed errors in the trial court's instructions to the jury.

In instructing on the credibility of the unindicted co-conspirator, Hammock, the court gave the following instruction:

> "An accomplice is one who voluntarily participates in the commission or the planning of a crime.
>
> "*The witness Elwood Lee Hammock is an accomplice of the accused in this case.* As an accomplice his testimony must be closely examined and weighed with great care.

"If the jury believes the testimony of an accomplice to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendant, even though it is not corroborated by any other evidence." (emphasis added)

This instruction was taken from Judge LaBuy's "Jury Instructions in Federal Criminal Cases", §6.07, 33 F.R.D. 523, 577. It is designated in the LaBuy manual as an "Alternative instruction where witness is an accomplice as a matter of law". Its ostensible, and very important, purpose is to warn the jury to look closely at an accomplice's testimony, and it is therefore intended to be beneficial, at least in that respect, to the defendant. The defendants contend, however, that this instruction resolved a material issue of fact: Hammock's involvement with Pyne and Fellabaum.

It is appropriate to instruct the jury that the witness (Hammock) was an accomplice and that he was involved in a crime. In cases such as this, that restates the obvious. The flaw is that this instruction, as given, can be understood to tell the jury that Hammock was an accomplice *of the accused as to this crime.* It is the jury's function to determine whether Hammock, an admitted accomplice, was an accomplice of the accused in the crime charged in the indictment. See the dissenting opinion in *United States* v. *Battaglia,* 394 F.2d 327 (7th Cir. 1968). We believe that the italicized portion of the quoted instruction is erroneous.

We hold, however, that the error, considered alone or together with the ruling criticized in section IV above, did not have "substantial influence" on the jury, and it is not deemed reversible error. *Kotteakos* v. *United States,* 328 U.S. 750 (1946). This was not a weak case against the defendants. Cf. *United States* v. *Donnelly,* 179 F.2d 227 (7th Cir. 1950).

Both defendants also assert error in the failure to give instructions labeled "D", "I", and "J", all of which allegedly related to theories of defense.

The court should, upon request, give an instruction regarding any theory of the defense for which there is any evidence in the record. *United States* v. *Phillips,* 217 F.2d 435 (7th Cir. 1955). However, there is no error in refusing to give an instruction which duplicates one that is substantially the same. *United States* v. *Kelly,* 349 F.2d 720 (2d Cir. 1965), cert. den. 384 U.S. 947 (1966).

The substance of instruction "D" was adequately embodied in the general conspiracy charge, labeled G-27. Furthermore, the requested instruction incorrectly infers that Fellabaum must have committed an overt act subsequent to entering the conspiracy. All that is required is that *one* of the conspirators commit an overt act after they have joined together. If an instruction is at all incorrect, it may properly be refused. *United States* v. *Kelly, supra.*

Instructions "I" and "J" embodied the defense theory that the government had offered insufficient proof of the knowledge or intent of the defendant Fellabaum that there was to be "travel in interstate commerce". The substance of instruction "J" was covered in instructions G-27, C-1, and Fella-H, and it was therefore properly refused.

Pyne also asserts error in the court's failure to give Pyne instructions "L" and "N". These instructions concerned the intent of the witness Hammock to commit the crime and also the defense of entrapment. We have already pointed out that the intent of the witness, Ham-

mock, after May 6 is not important. With reference to entrapment, there is no evidence in this record that would establish such defense. As stated in *Lopez* v. *United States,* 373 U.S. 427, 434-35 (1963):

> "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. . . . Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have *induced* the accused to commit the crime charged." (emphasis added)

See also *Sherman* v. *United States,* 356 U.S. 369, 372 (1958). There was no error in refusing these instructions.

Accordingly, the judgments of conviction are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Friday, March 7, 1969

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. MYRON L. GORDON, *District Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN M. FELLABAUM, *Defendant-Appellant.* No. 16780	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 3, 1969

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. MYRON L. GORDON, *District Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* Nos. 16780, 16781 vs. JOHN M. FELLABAUM, and JOHN J. PYNE, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing filed in the above-entitled cause be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 94

JOHN J. PYNE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 191 Misc.

JOHN M. FELLABAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1969. Petitions for rehearing were denied on April 3, 1969. The petitions for writs of certiorari were filed on May 2, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a charge of conspiracy to violate 18 U.S.C. 1952 was adequately proved by evidence which established an agreement to cause another's interstate travel, in order to engage in extortion.

2. Whether sufficient evidence supports the finding that petitioner Fellabaum had knowledge of the interstate nature of the conspiracy (Pet. No. 191 Misc.).

3. Whether the district court erred in admitting testimony concerning three statements petitioner Fellabaum made to an F.B.I. agent after being fully informed of his rights and after affirmatively waiving his right to the presence of the attorney whom he had retained for another case (Pet. No. 191, Misc.).

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois under an indictment charging that they and others conspired, 18 U.S.C. 371, to travel or cause travel in interstate commerce with intent to engage in extortion, 18 U.S.C. 1952. Petitioner Fellabaum was sentenced to imprisonment for a term of three years, to run consecutively to two other consecutive terms, of four and five years, which had been imposed in previous, similar cases (R. 95).[1] Petitioner Pyne was fined $10,000 and sentenced to imprisonment for five years consecutive to another five year term previously imposed in a similar case (R. 107). The court of appeals affirmed the convictions (Pets. App. A).

[1] "R." refers to the volume of the certified record containing the miscellaneous papers filed in the district court. "Tr." refers to the three-volume transcript of the trial proceedings.

The evidence of the offense is set forth in some detail in the opinion of the court of appeals (Pet. No. 94, App. A 2–3; Pet. No. 191 Misc., App. A 2–3) and that resume has been adopted by both petitioners. Briefly, the evidence shows that petitioner Fellabaum engaged in a homosexual act with a man in Chicago, then demanded and obtained the man's wallet (Tr. 39–41, 77–78, 86–88, 90–91). Two days later, Fellabaum delivered several cards from the wallet to one Hammock in New York and told him that the man appeared to be a good prospect for extortion (Tr. 90–92). Hammock promptly informed petitioner Pyne of the matter (Tr. 93, 95–96). In turn, Pyne informed one Kaminsky (Tr. 105–107), and within two days the three of them met in Chicago, discussed when they should approach their proposed victim, and telephoned Fellabaum in New York to join them (Tr. 106–119). Subsequently, Hammock was arrested by the FBI for another offense, and agreed to act as an informant in the present case (Tr. 121). Later Kaminsky telephoned Hammock in North Carolina and told him to proceed to Chicago (Tr. 139–142). Two days later, Kaminsky, Hammock, and Pyne met in Chicago (Tr. 145–157). The following day they started to drive to the home of the proposed victim; en route, however, they decided that they would arrive too late in the day—after banking hours—and therefore postponed the approach (Tr. 157–166, 171). Petitioners and the others were subsequently arrested.

ARGUMENT

1. Petitioners urge that their convictions for a conspiracy contemplating interstate travel cannot be based on Hammock's trip from North Carolina to Illinois, the only actual travel charged in the indictment, since he was then acting as a government informant. Petitioners were charged not with Hammock's travel or agreement to travel, however, but with their agreement to have him travel. Both of them had earlier discussed the proposed extortion with Hammock and others (Tr. 85–96, 107–109, 111–121) and the conspiracy was still viable as regards all participants but Hammock when Kaminsky telephoned Hammock in North Carolina and told him to come to Chicago (Tr. 139–142). Accordingly, Kaminsky's act was properly attributable to his co-conspirators, petitioners included. As the court of appeals pointed out (Pet. No. 94, App. A 4–5), the basic flaw in the argument lies in petitioners' assumption that the conspiracy charge required proof that would have sustained a substantive charge. This is not the law. See *United States* v. *Rabinowich,* 238 U.S. 78, 86, *Pinkerton* v. *United States,* 328 U.S. 640, 643–644. It sufficed to show agreement which contemplated causing Hammock to travel interstate as part of the extortionate scheme.

2. The evidence was sufficient to show that petitioner Fellabaum knew that the conspiracy would involve interstate travel. Fellabaum compromised the victim in Chicago (Tr. 39–41, 77–78, 86–88, 90–91), and then called Hammock in New York to describe the favorable prospects for extortion (Tr. 86–87). He later went to New York to deliver cards from the victim's

wallet to Hammock (Tr. 90–92). Hammock went to Chicago, met Pyne, then called Fellabaum in New York and told him to return to Chicago (Tr. 106, 117, 119). Plainly Fellabaum had firsthand knowledge of the interstate aspects of the conspiracy; it is immaterial whether or not he knew specifically that Hammock would be asked to travel from North Carolina to Illinois. A co-conspirator with general knowledge of the scope of a scheme need not be shown to know all its details. *Blumenthal* v. *United States*, 332 U.S. 539, 557.

3. Petitioner Fellabaum argues that testimony of an FBI agent concerning statements which Fellabaum made to the agent on three occasions in June of 1966 should have been excluded from evidence. The basis of the claim is that the statements were made in the absence of an attorney, Mr. Sonenshine, who was representing him in another case. But on each occasion the statements were made after Fellabaum had been fully informed that he had a right to make no statement and to furnish no information, that any statement he did make could be used against him, and that he was entitled to have his attorney, Mr. Sonenshine, or anyone else he might wish present (Tr. 44–47). On each occasion, Fellabaum signed a written waiver on his right to the presence of counsel before speaking to the agent. Indeed, the signed waivers indicate that he specifically requested that Mr. Sonenshine, who also represented Kaminsky in the other case, not be present; he did not want Mr. Sonenshine to be advised that the FBI was interviewing him (Tr. 47–50, 57–64, 72–73). In the absence of any counter-

vailing testimony as to the voluntariness of the waivers, the district court denied Fellabaum's motion to suppress the statements (Tr. 72–74). There was a waiver of the right to counsel's presence sufficiently express to permit the admission of testimony concerning the statements. See *Miranda* v. *Arizona*, 384 U.S. 436, 475.

Fellabaum nevertheless now contends that since Mr. Sonenshine was his attorney, it was improper for the agent to talk to him without giving the attorney notice, citing dictum in *Mathies* v. *United States*, 374 F. 2d 312 (C.A.D.C.) (Pet. No. 191 Misc., pp. 10–11). In *Mathies*, however, the defendant had retained the attorney to represent him in the case about which he was questioned, and did not insist, as petitioner Fellabaum did, that counsel not be notified. Where the waiver of counsel's presence is clear, failure to notify counsel does not in itself preclude admission of an accused's statement. *Wilson* v. *United States*, 398 F. 2d 331 (C.A. 5); *Coughlan* v. *United States*, 391 F. 2d 371 (C.A. 9), certiorari denied, 393 U.S. 870. The situation is *a fortiori* where the accused expressly asks that counsel be neither notified nor present during the interview.

4. The remaining claims—that the instructions might have led the jury to consider Fellabaum's statements to the FBI against Pyne (No. 94)[2] and that there was a prejudicial accomplice instruction (No.

[2] The testimony concerning these statements included no reference, either express or implied, to the participation in the offense of anyone but Fellabaum. Nor is any claim here made that the use of the testimony at trial involved any violation of the principles of *Bruton* v. *United States*, 391 U.S. 123.

191 Misc.)—raise no issue of significance and are adequately dealt with in the opinion below (See Pet. No. 94, App. A 9–11, 12–13). We therefore rely on that opinion in opposing the grant of certiorari on these issues.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
RONALD L. GAINER,
Attorneys.

JULY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969